

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	
)	
TERRY L. DOWDELL, <i>et al.</i> ,)	<u>MEMORANDUM OPINION</u>
)	
Defendants,)	
)	
MARY DOWDELL, <i>et al.</i> ,)	
)	
Relief Defendants.)	JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on the Receiver's motion for the entry of an injunction to, *inter alia*, refrain the Dowdell relief defendants and their agents from drawing on lines of credit secured by residential real estate. Having thoroughly considered the entire case, the arguments presented at the October 10, 2002 preliminary injunction hearing, and all relevant law, the court, for reasons articulated in this memorandum opinion, shall grant the Receiver's motion for the entry of a preliminary injunction.

I.

In brief, this is a Securities and Exchange Commission (SEC) enforcement action. The defendants in this case orchestrated and operated a Ponzi or pyramid scheme. According to the Permanent Injunction Order, which incorporated the Consent and Stipulation of defendant Terry Dowdell, under the "Vavasseur program," clients were promised high profits for their

investments, while the defendants would simply use the money put in by the newest investors to pay earlier investors their promised “profits.” Defendants would then misappropriate the remaining funds, which, by present accounts, amounted to approximately \$29,000,000.00.

On November 19, 2001, the court granted the motion of the plaintiff SEC for an *ex parte* temporary restraining order (TRO), which included provisions enjoining the defendants from committing federal securities violations, freezing the assets of certain of the defendants and setting various discovery deadlines. In granting the *ex parte* TRO on November 19, 2001, the court found that the SEC had met its burden of providing a proper showing, as required by 15 U.S.C. § 78u(d)(1) and 15 U.S.C. § 77t(b), that such relief was warranted. The SEC put forth what the court deemed sufficiently credible information presenting a case that a violation had occurred of the statutes involved, including, *inter alia*, 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), and 15 U.S.C. § 78o, and that such violations were occurring or would continue to occur. The TRO provided, among other things, for the freezing of assets of three individuals, Terry L. Dowdell, Birgit Mechlenburg and Kenneth G. Mason and two business entities, Dowdell Dutcher & Associates, Inc., and Vavas seur Corporation. Then, on March 14, 2002, the court issued an Order of Preliminary Injunction, which incorporated the asset freeze order found in the TRO.

Since the entry of the Preliminary Injunction Order, the SEC and the court appointed Receiver have continued investigating the Vavas seur Program. That investigation has led to the allegations that defendant Dowdell used misappropriated funds to purchase two residential homes in the Charlottesville, Virginia area for relief defendants Adam Dowdell and Rebecca Dowdell. It has also come to the court’s attention that the aforementioned relief defendants obtained lines

of credit from BB&T Bank, which were secured by the residential real estates that defendant Dowdell purchased with ill-gotten gains.

Therefore, by temporary restraining order entered September 30, 2002, the court: (1) enjoined Adam Dowdell, Wendatta Dowdell, Rebecca Dowdell, M. Wayne Hensley and their agents from drawing on lines of credit secured by residential real estate; (2) enjoined BB&T from extending credit on account no. 9032439743506001 or any other loans secured by real estate commonly known as 21 Deer View Road, Keswick, VA 22947-2157; and (3) enjoined BB&T from extending credit on account no. 903117911106001 or any other loans secured by real estate commonly known as 1464 Birchcrest Lane, Charlottesville, VA 22911. Because of the limited duration of the TRO, the question now before the court is whether indefinitely to enjoin the aforementioned activity by entering a Rule 65(a) preliminary injunction.

II. Applicable Law – Preliminary Injunction:

Pursuant to *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-96 (4th Cir. 1977) and its progeny, the court must consider the four-factor balance of hardships test for preliminary injunctions. Specifically, the court must make a determination that the plaintiff (1) will suffer irreparable harm if he does not receive the requested injunctive relief. Once this finding has been made, the court must assess (2) the likelihood of harm to the defendants if the court issues a preliminary injunction against them. The court then must balance these harms to be suffered by the parties if the court denies or grants, respectively, the motion for injunctive relief. Thereafter, the court must consider whether (3) the plaintiff is likely to succeed on the merits, or if the balancing test in the previous steps (*i.e.*, steps “(1) and (2)”) clearly favors the

plaintiff, the court need only satisfy itself that the plaintiff has raised substantial and serious questions on the merits. Finally, the court should consider (4) whether public interest favors injunctive relief. *Blackwelder*, 550 F.2d at 195-96; *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Direx Isreal. LTD. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812-13 (4th Cir. 1991)).

The four *Blackwelder* factors “... are not, however, all weighted equally.” *Hughes Network Systems v. InterDigital Communications*, 17 F.3d 691, 693 (4th Cir. 1994) (Wilkinson, J.). “The ‘balance of hardships’ reached by comparing the relevant harms to the plaintiff and defendant[s] is the most important determination, dictating, for example, how strong a likelihood of success showing the plaintiff must make.” *Id.* (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991)). Thus, while the four factors must figure into the court’s analysis, the weight given to each depends on the strength of the other factors.

“Additionally, while the factors articulated in *Blackwelder* guide the district court’s judgment on a preliminary injunction motion, the decision to grant or deny relief lies within that court’s sound discretion and will not be set aside absent an abuse of discretion.” *Id.* (citing *Rum Creek*, 926 F.2d at 358)). “[G]ranting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way. ‘[T]he danger of a mistake’ in this setting ‘is substantial.’” *Hughes*, 17 F.3d at 693 (quoting *American Hosp. Supply Corp. v. Hospital Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)). For this and other problems associated with the issuance of injunctive relief, the Supreme Court requires that the harm to the plaintiff be irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90

(1974), *cited in Hughes*, 17 F.3d at 694. The Court explained, “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Sampson*, 415 U.S. at 90 (quoting *Virginia Petroleum Jobbers Assoc. v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C.Cir.1958)), *cited in Hughes*, 17 F.3d at 694.

“Where the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable. Monetary relief typically may be granted as easily at judgment as at a preliminary injunction hearing, and a party does not normally suffer irreparable harm simply because it has to win a final judgment on the merits to obtain monetary relief.” *See Hughes*, 17 F.3d at 694 (citations omitted).

III. Preliminary Injunction Standard and the Facts of this Case:

1. Irreparable Harm to the Plaintiff:

Courts have held that this factor is satisfied where the supplier-creditor (or in this case, Receiver) shows that the trust (or Receivership estate) is dissipating and that absent injunctive relief their ultimate recovery is rendered unlikely. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 141 (3rd Cir. 2000) (dealing with trust dissipation in a PACA case). Here, the Receiver contends that if the injunction is denied, there is a significant likelihood of actual and imminent harm due to dissipation of Receivership property. According to the Receiver, by the end of August, 2002, Adam Dowdell and Rebecca Dowdell drew down

\$98,567.46 and \$67,763.47 respectively from their lines of credit secured by homes purchased with ill-gotten gains. This is sufficient under current case law to make out an argument for irreparable harm in that this represents “facts probative of ... the dissipation of ... assets.” *Id.* The court shall find, therefore, that the “irreparable harm to plaintiff” factor is satisfied.

2. Likelihood of Harm to Defendant/Balance of Harm:

In the case at bar, the only perceived harm to the relief defendants is the limitation of their ability to secure and use lines of credit on their homes. Courts have found the harm to the defendant minimal in similar cases. *See, e.g., Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) (authorizing an injunction freezing assets to aid in granting ultimate equitable relief of rescission). *See also U.S. ex rel. Rahman v. Oncology Associates, P.C.*, 198 F.3d 489 (4th Cir. 1999) (upholding preliminary injunction entered, *inter alia*, to avoid asset dissipation).

The harm to the relief defendants must be balanced with the harm to the Receiver and the innocent investors. The Receiver may never be able to make the investors victimized by the Vavasseur Program whole if the court allows the temporarily enjoined conduct to resume. Thus, the balance is heavily in favor of the Receiver.

3. Likelihood of Success on the Merits:

It is undisputed that Terry Dowdell, through the Vavasseur Program, helped to embezzle in excess of \$29 million from innocent investors. There is also uncontroverted evidence that defendant Dowdell used Vavasseur funds to purchase the residences at issue in this matter. Given the aforementioned facts, it is highly likely that the Receiver would succeed on the merits of his claim to enjoin permanently the relief defendants from securing lines of credit based on real

estate purchased with ill-gotten gains.

4. Public Interest:

The public interest will be served by issuance of a preliminary injunction because it will promote the protection of property rights and permit the Receiver to preserve assets that may be liquidated for the claimants of the Receivership Estate.

IV. Conclusion:

An analysis of the factors results in the conclusion that the Receiver's motion satisfies each of the four factors; hence a preliminary injunction shall issue. Under federal law, preliminary injunctions can be unlimited in duration. *Ciena Corp. v. Jarrard*, 203 F.3d 312, 319 (4th Cir. 2000) ("a preliminary injunction is unlimited in duration"). The court finds no reason to limit the duration of the injunction entered here.

Finally, a district court must fix a bond whenever it grants a restraining order. "No restraining order . . . shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully . . . restrained."

Fed. R. Civ. P. 65(c).

The Fourth Circuit has held that the rule about setting bond is mandatory and unambiguous and, although the district court has discretion to set the bond as it deems proper, it may not disregard the bond requirement altogether. *See Hoescht*, 174 F.3d at 421. "Failure to require a bond upon issuing injunctive relief is reversible error." *Id.* Where the court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the

court may set a nominal bond. *See id.* at 421 n.3 (citing Second Circuit case where bond amount was set at zero). Accordingly, the Receiver shall post a bond as security in the amount of \$100.00. An appropriate Order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion and the accompanying Order to Magistrate Judge Crigler, the Receiver and to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	
)	
TERRY L. DOWDELL, <i>et al.</i> ,)	<u>ORDER</u>
)	
Defendants,)	
)	
MARY DOWDELL, <i>et al.</i> ,)	
)	
Relief Defendants.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, the court finds that (1) if the Receiver's Motion for a Preliminary Injunction is denied, there is significant likelihood of actual and imminent irreparable harm to the Receiver due to the dissipation of Receivership property; (2) if the Motion for Preliminary Injunction is granted, there is little likelihood of harm to Adam Dowdell, Wendetta Dowdell, Rebecca Dowdell, M. Wayne Hensley, and their agents; (3) the Receiver is likely to succeed on the merits; and (4) the public interest will be served by such Preliminary Injunction Order because it will promote the protection of property rights and permit the Receiver to preserve assets that may be liquidated for the claimants of the Receivership Estate.

Accordingly, it is this day

ADJUDGED, ORDERED AND DECREED

as follows:

- (1) the Receiver shall post a bond as security in the amount of \$100.00;
- (2) Adam Dowdell, Wendetta Dowdell, and their agents, attorneys, employees and successors are indefinitely enjoined from drawing on lines of credit secured by residential real estate commonly known as 21 Deer View Road, Keswick, VA 22947-2157;
- (3) Rebecca Dowdell, M. Wayne Hensley, and their agents, attorneys, employees, and successors are indefinitely enjoined from drawing on lines of credit secured by residential real estate commonly known as 1264 Birchcrest Lane, Charlottesville, VA 22911;
- (4) BB&T is indefinitely enjoined from extending credit on account number 903249743506001 or any other loans secured by real estate commonly known as 21 Deer View Road, Keswick, VA 22947-2157; and
- (5) BB&T is indefinitely enjoined from extending credit on loan account number 903117911106001 or any other loans secured by real estate commonly known as 1464 Birchcrest Lane, Charlottesville, VA 22911.

The Clerk of the Court hereby is further directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler, the Receiver and to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date

